

The eighteen funding request numbers ("FRNs") identified in the case caption above are associated with Riverside's and Spectrum's agreement. The total pre-discount value of the agreement for all E-rate services between Riverside and Spectrum was \$5,495,471.70. As calculated on the Form 471, Riverside was eligible for a Program discount of 67 percent. Consequently, pursuant to Commission and Program rules, Riverside and/or its consortium members were required to pay 33 percent, or \$1,813,505.66, of the total contract price. Some consortium members later decided to retain their equipment and, instead, pay their portion of the contract price in cash. The total amount of cash paid to Spectrum was \$155,996.21. The remaining portion of the purchase price owed by Riverside was paid by traded-in equipment.

**B. USAC Upheld the SLD's Determination that the Trade-In Equipment was not Valued Appropriately.**

The SLD contended that the fair market value of Riverside's traded-in equipment was less than Riverside's non-discounted share for services purchased through the E-rate Program, based upon the date the equipment was valued. USAC, upholding the SLD's determination, stated that:

[T]he trade-in amount was based on the value of the equipment at the time of the contract, which was before the start of the funding year and several months before Spectrum was set to take possession of the equipment. Spectrum provided an independent appraisal indicating the FMV [fair market value] of the equipment as of July 1, 1999. SLD has accepted this appraisal and determined that the recovery amounts should be based on the date that Spectrum took possession of the equipment, but no earlier than the first day of the funding year.

The FCC has directed USAC "to adjust funding commitments made to schools and libraries where disbursement of funds associated with those commitments would result in violations of a federal statute" and to pursue collection of any disbursements that were made in violation of a federal statute.<sup>6</sup>

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<sup>6</sup> *Administrator's Decision on Appeal* at 2.

USAC agreed with the SLD that the appropriate date for valuing Riverside's trade-in equipment was the beginning of the 1999-2000 funding year (July 1, 1999) and not at the time Riverside and Spectrum entered into an agreement for E-rate services (March 1999). Using a valuation date of July 1, 1999, USAC contends that the total fair market value of the consortium's equipment was \$1,316,159.<sup>7</sup> This value was based upon a third-party appraisal, which was requested by the SLD as part of an audit in 2003. USAC neglects to mention that it also has an independent appraisal of the fair market value of the trade-in equipment as of contract formation, March 1999, and that this valuation shows that Spectrum's appraisal of the value of the trade-in equipment in March 1999 was the fair market value as required by Program rules that were in effect in 1999. Also, contrary to the *Administrator's Decision on Appeal*, there was no violation of a federal statute in this case, and there certainly was no violation of any applicable FCC or USAC statute, rule or guidance with respect to trade-in equipment that was applicable to Spectrum and Riverside in 1999. The parties complied with all known rules, laws and statutes.

In March 2003, four years after approving Riverside's funding, after valuable E-rate services were provided by Spectrum and received by Riverside, and paid for, in part, through the fair market value of Riverside's trade-in equipment, Ed Falkowitz, an SLD account manager, contacted Spectrum stating that it was conducting an internal audit regarding the trade-in value of Riverside's equipment. To assist the SLD in its investigation, and at the SLD's request, an

<sup>7</sup> Under USAC's calculations, the total amount of matching funds that should have been paid by Riverside was \$1,472,155.21 (\$1,316,159 in equipment, plus \$155,996.21 in cash). Based upon Riverside's 67 percent discount, the payment of matching funds in the amount of \$1,472,155.21 would entitle Riverside to an E-rate discount of \$2,988,921.18. USAC previously disbursed \$3,681,966.04, which is \$693,044.96 more than it believes it should have disbursed (\$2,988,921.18 in actual disbursements minus \$1,472,155.21 in alleged appropriate disbursements). Inexplicably, however, the total amount USAC seeks to recover is \$707,521.34 – not \$693,044.96.

independent appraisal regarding the value of the equipment was undertaken in 2003 using both the actual appraisal date, March 1999, and July 1, 1999, the date suggested by the SLD. The Appraisal Report valued Riverside's equipment at \$1,859,321 in March 1999 and \$1,316,159 as of July 1, 1999.<sup>8</sup> The Appraisal Report, which USAC and the SLD accepted as dispositive of the July 1, 1999 valuation, concluded that Spectrum's valuation of the equipment as of March 1999, was entirely consistent with the then-current market.

In valuing the trade-in equipment in 1999, Riverside and Spectrum complied with all Program rules that were effective at that time (*i.e.*, they assessed the appropriate fair market value of the equipment, and they did not trade in equipment that was previously purchased with Program funds). In the absence of specific guidance on when the trade-in equipment should be valued, the parties observed the basic legal principle that essential contract terms, including the consideration for a contract (*i.e.*, the trade-in equipment) must be definite and certain at the time of contract formation. The SLD's and USAC's actions in imposing a new date of valuation, based upon retroactive application of new Program rules, rewrites the essential terms of the agreement (*i.e.*, offer, acceptance and consideration) without the assent of the parties.

**C. Commission and SLD Guidance in 1999.**

At the time Riverside filed its Form 470 and entered into a contract with Spectrum in 1999, very little guidance was available to participants in the E-rate Program regarding the FCC's and SLD's policy for trading in equipment. Even now, the guidance does not specifically address *when* the fair market value of traded-in equipment should be determined in all cases. Rather, it only addresses fair market value in the case of the SLD's 3-year depreciation value analysis discussed below.

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<sup>8</sup> See Appraisal Report.

Today, the SLD's website has a page devoted to trading in equipment. That page advises that a Program applicant can trade in equipment and apply the value of that equipment to the non-discounted portion of new products and services that are funded through the E-rate Program.<sup>9</sup> The SLD places certain conditions, however, on trading in equipment: (1) equipment previously purchased with E-rate discounts cannot be used toward payment of an applicant's non-discount share; and (2) the amount credited toward the non-discounted share must be the fair market value or acquisition cost, whichever is lower.<sup>10</sup> The foregoing Program rules were applicable in 1999 when Spectrum and Riverside entered into their agreement for E-rate services. However, with regard to determining fair market value, the Program rules now also state the following:

There is a rebuttable presumption that technology equipment has a three-year life and that the value declines on a straight-line basis. Therefore, the presumptive value of a component with an original cost of \$1000 would be \$666 after one year, \$333 after two years, and would have no value after three years. Time periods are calculated from the date that equipment was originally delivered to the applicant to the estimated delivery date to the service provider. The applicant or service provider may provide evidence of fair market value to rebut this presumption. Although the form of the evidence is flexible, the best evidence would be from an independent third party source indicating the secondary market prices for the specific make and model of equipment traded in.<sup>11</sup>

As an initial matter, the Program rules regarding timing of valuations and depreciation methodology were not available in 1999. The SLD's guidance at that time was more general, stating only that equipment must be traded-in at its fair market value and that the equipment to be traded could not be equipment previously purchased with Program funds. As discussed

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<sup>9</sup> Universal Service Administrative Company, "Transfer or Trade-in of Components," available at <http://www.sl.universalservice.org/reference/epsfaq-f.asp> (last modified Feb. 13, 2004).

<sup>10</sup> *See id.*

<sup>11</sup> *Id.*

above, Spectrum and Riverside fully complied with these requirements. Spectrum carefully evaluated Riverside's equipment, which had not been previously purchased with Program funds, at the time they formed their agreement and calculated the fair market value of the equipment based upon Spectrum's considerable expertise in the market. Although the Program rules now explain how and when to assess the fair market value of equipment under the SLD's presumptive 3-year depreciation value analysis, it is devoid of any explanation regarding how or when Program participants should assess the fair market value of equipment using any other analysis. It does not appear that the new Program rule requires, as USAC contends in the *Administrator's Decision on Appeal*, that all valuations for trade-in equipment must be based on the date the service provider takes possession of the equipment, or no earlier than the first day of the funding year. Rather, it appears the new Program rule prescribes the dates to be used for valuing equipment when parties use the 3-year depreciation analysis. Spectrum did not use a 3-year depreciation analysis in the case of Riverside, and thus the new rule is inapplicable. In addition, the new Program rule allows for independent third party appraisals to rebut the SLD's presumptive 3-year depreciation value analysis, which Spectrum provided in this case.

Most importantly in this case, with the exception of requirements for a fair market valuation and a prohibition against trading-in "Program" equipment which Spectrum and Riverside observed, none of the foregoing guidance about the date upon which trade-in equipment should be valued, or valuation methodologies, was available to Spectrum or Riverside in 1999 when Spectrum assessed the fair market value of Riverside's equipment, Spectrum bid for Riverside's E-rate services, Riverside accepted Spectrum's bid, the parties entered into an agreement for services and agreed upon the consideration, the SLD approved Riverside's funding requests, and valuable E-rate services were provided in reliance thereon. Spectrum was

notified of the SLD's new policy only after Mr. Falkowitz from the SLD contacted Spectrum in March 2003.<sup>12</sup> The email correspondence between Mr. Falkowitz and Spectrum, indicates that the only "guidance" the SLD received from the FCC on this issue was that the fair market value of traded-in equipment could be calculated using the rebuttable presumption that equipment has a useful life of three years.<sup>13</sup> It does not appear the FCC addressed the date upon which the fair market value should be determined.

### III. QUESTIONS PRESENTED FOR REVIEW.

#### A. What Was the Required Valuation Date for Equipment that Was Traded-In Through the E-Rate Program in 1999?

Today, the SLD and USAC claim that equipment that is traded in for the purpose of paying an applicant's non-discounted portion of services purchased through the E-rate Program must be valued either at the time the service provider takes possession of the equipment or the first day of the applicable Program funding year. This guidance was not available to Riverside and Spectrum in 1999 and should not be applied retroactively to either devalue services that were already provided in reliance on the former rules and SLD funding grants, or require additional cash consideration from Riverside which it did not agree to pay for E-rate services in 1999. In the absence of specific guidance from the FCC or the SLD, the parties followed basic, well-established principles of contract law when they entered into their agreement for E-rate services and assessed a fair market value for Riverside's traded-in equipment at the time of contract formation. This valuation was later substantiated by an independent third party appraisal. It is also important to note that Riverside and Spectrum were required to assess the fair market value

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<sup>12</sup> See email from Ed Falkowitz, Accounting Manager, SLD, to John Price, then-present Chief Financial Officer of Spectrum (Mar. 3, 2003), attached as Exhibit 4 hereto.

<sup>13</sup> See *id.*

of the trade-in equipment and agree upon the consideration at the time of contract formation in order to obtain necessary board approvals and meet applicable SLD filing deadlines.

"Under long-standing principles of contract law, three familiar elements are typically required for the formation of a contract: offer, acceptance, and consideration."<sup>14</sup> Consideration is an essential element of a valid contract,<sup>15</sup> and a contract is not enforceable unless its terms and conditions are definite and certain.<sup>16</sup> In the absence of specific FCC or USAC guidance regarding the timing of valuations for trade-in equipment, Spectrum and Riverside used basic principles of contract law and, at the time of contract formation -- not an undefined later date -- assigned a fair market value to the trade-in equipment that would be used in lieu of cash. Without an upfront understanding by Riverside and Spectrum of the combination of consideration that would be paid for the E-rate services, and the corresponding payment obligations, the contract would have lacked definite and enforceable terms.

In response to Riverside's Form 470, Spectrum submitted a proposal that would meet the technology plan objectives of the consortium while, at the same time, avoid a significant cash outlay. Riverside reviewed the proposal and found it to be the most cost-effective response to its Form 470. Before agreeing to hire Spectrum, however, Riverside and/or its consortium members were required to obtain school board approval of the proposed contract. It would have been impossible for Riverside and its member districts to have obtained board approval without first

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<sup>14</sup> "Government Contract Cases in the United States Court of Appeals for the Federal Circuit: 1996 in Review," C. Stanley Dees and David A. Churchill, 46 Am. U.L. Rev. 1807, 1844 (Aug. 1997) (citing the Restatement (Second) of Contracts, §§ 17(1), 22(1)).

<sup>15</sup> See, e.g., *Agosta v. Astor*, 120 Cal. App. 4th 596, 605 (2004); *Lopez v. Charles Schwab & Co., Inc.*, 118 Cal. App. 4th 1224, 1230 (2004).

<sup>16</sup> See, e.g., *Suffield Development Associates Ltd. Partnership v. Society for Sav.*, 708 A.2d 1361 (1998).

describing in detail the purchase price and the terms (including the amount of cash required) of the agreement, and the E-rate services that would be received in exchange. Consequently, the parties had to value the equipment at the time they reached an agreement.

E-rate Program rules require applicants and service providers to enter into agreements for E-rate services before filing a Form 471.<sup>17</sup> Applicants use the Form 471 to request discounts from the SLD for eligible services, and specific amounts for the cost of the purchased services must be recorded in the Form 471. The agreement necessarily establishes the type and amount of consideration an applicant must pay for the goods and services purchased from a service provider so the applicant can seek the appropriate amount of E-rate support. It would have been impossible in this case for Riverside and Spectrum to predict the value of the equipment at some future date and still comply with USAC's requirement that the agreement be executed and the Form 471 filed by April 6, 1999. If Riverside and Spectrum had waited until the start of the funding year (July 1, 1999) to value the equipment, Riverside would have had to wait to enter into a contract with Spectrum and would have missed the deadline for filing its Form 471.

**B. Did the Administrator Exceed its Authority by Creating New Policy and then Applying that Policy Retroactively to Spectrum?**

**1. The Administrator Exceeded its Authority in Adopting a New Policy Without FCC Guidance.**

The FCC appointed USAC to administer the E-rate Program in 1998. USAC's authority over the Program is limited to implementing and applying the FCC's Part 54 rules, and the FCC's interpretations of those rules as found in agency adjudications.<sup>18</sup> USAC is not

<sup>17</sup> Universal Service Administrative Company, Selecting Service Providers, available at: <http://www.sl.universalservice.org/reference/selectingsp.asp>.

<sup>18</sup> 47 C.F.R. § 54.702(c).



empowered to make policy, interpret any unclear rule promulgated by the FCC<sup>19</sup> or to create the equivalent of new guidelines.<sup>20</sup> The Administrator exceeded its authority in this case by creating a new policy not previously elucidated by the FCC – namely, that the fair market value of traded-in equipment cannot be calculated at the time that an E-rate applicant and service provider execute a contract for E-rate services and products, consistent with basic principles of contract law.

In 1999 when Spectrum and Riverside entered into their agreement, there was no FCC or Program guidance that addressed *when* the fair market value of traded-in equipment should be determined, and such formal guidance still does not exist today (except in the case of equipment that is valued using a 3-year depreciation analysis). Spectrum only became aware of the new SLD Program rule in March 2003 when Mr. Falkowitz contacted Spectrum about the trade-in value of Riverside's equipment.<sup>21</sup> As noted above, however, it does not appear that the FCC gave the SLD specific guidance regarding the date upon which the fair market value should be determined. Rather, the email correspondence between Mr. Falkowitz and Spectrum, indicates that the only "guidance" the SLD received from the FCC on this issue was that the fair market value of traded-in equipment could be calculated using the rebuttable presumption that equipment has a useful life of three years.<sup>22</sup> It appears USAC has made a policy and created the

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<sup>19</sup> *Id.*

<sup>20</sup> *Changes to the Board of Directors of the Nat'l Exchange Carrier Ass'n, Inc.*, Third Report and Order, 13 FCC Rcd 25058, 25066-67 (1998) ("*NECA Third Report and Order*").

<sup>21</sup> See email from Ed Falkowitz, Accounting Manager, SLD, to John Price, then-present Chief Financial Officer of Spectrum (Mar. 3, 2003), attached as Exhibit 4 hereto.

<sup>22</sup> See *id.*

equivalent of new guidelines regarding the timing of valuations for all traded-in equipment in violation of its charter.

**2. The Administrator Exceeded its Authority in Retroactively Applying a Later-Adopted SLD Policy to Previously Granted Funding Requests.**

Even assuming, *arguendo*, that the Administrator had authority to adopt the policy that the fair market value of traded-in equipment cannot be determined at the time a contract is executed, the Administrator still exceeded its authority by retroactively applying the policy in this case. In this case, the Administrator is attempting to apply a new Program rule regarding the timing for valuation of trade-in equipment to a contract for E-rate services that was entered into in 1999, and performed in 1999-2000, three years before adoption of the new Program rule.

It is a basic tenet of American jurisprudence that if a court overturns its prior precedent in a line of cases, the new precedent is applied prospectively. The court does not re-open every prior case, retroactively apply the new precedent and overturn all prior concluded decisions.<sup>23</sup> In *RKO General v. FCC*,<sup>24</sup> the U.S. Court of Appeals for the D.C. Circuit addressed retroactive application of new Commission precedent very clearly:

Although an administrative agency is not bound to rigid adherence to its precedents, it is equally essential that when it decides to reverse its course, it must give notice that the standard is being changed . . . and apply the changed standard only to those actions taken by parties after the new standard has been proclaimed as in effect.<sup>25</sup>

<sup>23</sup> See generally 28 U.S.C. § 2106 ("The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review.")

<sup>24</sup> *RKO General, Inc. v. FCC*, 670 F.2d 215 (D.C. Cir. 1981).

<sup>25</sup> *Id.* at 223-24, citing *Boston Edison Co. v. PFC*, 557 F.2d 845 (D.C. Cir. 1997) cert. denied sub nom. *Towns of Norwood, Concord and Wellesley, Mass. V. Boston Edison Co.*, 434 U.S. 956 (1988).

In addition, "an agency may be prevented from applying a new policy retroactively to parties who detrimentally relied on the previous policy."<sup>26</sup>

The SLD's standard regarding when to evaluate the fair market value of traded-in equipment was expressed to Spectrum only in March 2003 through general correspondence. This standard has not, and even today is not, explicitly stated in any FCC decision or on the SLD's website as a Program rule (except in the case of equipment that is valued using a 3-year depreciation analysis). Even if the FCC finds such a rule is now applicable, consistent with the finding in *RKO*, new or changed standards can be applied prospectively only to pending or future applications, not retroactively to granted applications.

In addition, Spectrum and Riverside detrimentally relied on the FCC and SLD guidance that was available in 1999, and it detrimentally relied on the SLD's grant of Riverside's funding requests under the former rules pursuant to which valuable E-rate services were provided and accepted. It is unreasonable for a Program participant, exercising good faith and complying with all applicable Program rules and general principles of contract law, to be penalized for acting reasonably under the circumstances, especially when there was no contrary FCC or USAC guidance specifying the date on which the fair market value of traded-in equipment should be assessed. Riverside and Spectrum had no other recourse but to reasonably assume the equipment should be valued at the time the agreement was formed.

There is an extensive body of judicial case law regarding impermissible retroactivity in which the courts discuss basic notions of equity and fairness and detrimental reliance by citizens

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<sup>26</sup> *New England Telephone and Telegraph Co. v. FCC*, 826 F.2d 1101, 1110 (D.C. Cir. 1987) citing *RKO General*, 670 F.2d at 223.

on prior agency policies.<sup>27</sup> There is no need to present a full discussion of such retroactivity here, as the FCC's own decisions in prior SLD matters reflect its own concern about the retroactive application of new precedent.

In a November 5, 1999 FCC decision involving the E-rate Program, the Commission considered a case in which the Prairie City School District ("Prairie City") sought review of an

<sup>27</sup> See *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 224 (1988) (J. Scalia concurring) ("[W]here legal consequences hinge upon the interpretation of statutory requirements, and where no preexisting interpretive rule construing those requirements is in effect, nothing prevents the agency from acting retroactively through adjudication."). See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 293-294 (1974); *SEC v. Chenery Corp.*, 332 U.S. at 194, 202-03 (1947). See also *Verizon Telephone Co. v. FCC*, 269 F.3d 1098 (2001) ("[T]he governing principle is that when there is a 'substitution of new law for old law that was reasonably clear,' the new rule may justifiably be given prospectively-only effect in order to 'protect the settled expectations of those who had relied on the preexisting rule.'"); *Id.* at 1109, citing *Williams Natural Gas Co. v. FERC*, 3 F.3d 1544, 1554 (D.C. Cir. 1993)). Moreover, retroactivity will be denied "when to apply the new rule to past conduct or to prior events would work a manifest injustice." *Id.* citing *Clark-Cowlitz Joint operating Agency v. FERC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987). To determine whether a manifest injustice will result from the retroactive application of a statute, a court must balance the disappointment of private expectations caused by retroactive application against the public interest in enforcement of the statute. *Demars v. First Serv. Bank for Sav.*, 907 F.2d 1237, 1240 (1st Cir. 1990) (citing *New England Power v. United States*, 693 F.2d 239, 245 (1st Cir. 1982)). The D.C. Circuit Court notes that it has not been entirely consistent in enunciating standards to determine when to deny retroactive effect in cases involving "new application of existing law, clarifications and additions" resulting from adjudicatory actions. In *Cassell v. FCC*, the court acknowledges that it has used the five-factor test set forth in *Clark-Cowlitz* as the "framework for evaluating retroactive application of rules announced in agency adjudications." *Cassell v. FCC*, 154 F.3d 478, 486 (D.C. Cir. 1998) citing *Clark-Cowlitz*, 826 F.2d at 1081. In a subsequent case, the court substituted a similar three-factor test. See *Dist. Lodge 64 v. NLRB*, 949 F.2d 441, 447 (D.C. Cir. 1991) (citing *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971)). Today, the court has moved from multi-pronged balancing tests for impermissible retroactivity in favor of applying basic notions of equity and fairness. See *Cassell*, 154 F.3d at 486 (declining to "plow laboriously" through the *Clark-Cowlitz* factors, which "boil down to a question of concerns grounded in notions of equity and fairness"); *PSCC v. FERC*, 91 F.3d 1478, 1490 (concluding that "the apparent lack of detrimental reliance . . . is the crucial point [supporting retroactivity]"). In *Chadmoore Communications, Inc. v. FCC*, the court stated that the test it commonly uses to determine whether a rule has retroactive effect is if "it does not impair [ ] rights a party possessed when it acted, increase [ ] a party's liability for past conduct, or impose [ ] new duties with respect to transactions already completed." *Chadmoore*, 113 F.2d 235, 240 (D.C. Cir. 1997), citing *DIRECTV, Inc. v. FCC*, 110 F.3d 816, 825-26 (D.C. Cir. 1997) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994)).

SLD denial of its application for universal service support.<sup>28</sup> Prairie City argued that the SLD's denial should be overturned because Prairie City filed its application in reliance on filing guidelines provided by the SLD on its website. The FCC agreed with Prairie City and directed the SLD to issue a new funding commitment decision letter. Citing *Williamsburg-James City*, the FCC found that where an application was submitted before the establishment of a particular and applicable rule, the applicants could not have been aware of the application requirements.<sup>29</sup>

The FCC also has recognized that clarifications of its universal service policies are to be applied prospectively only by the SLD. In *Ysleta*<sup>30</sup> and *Winston-Salem*<sup>31</sup> the FCC clarified that a party submitting a bona fide service request under the E-rate Program must provide a Form 470 that lists the specific services for which the applicant anticipates seeking E-rate discounts, rather than a Form 470 that listed every service or product eligible for discounts.<sup>32</sup> The FCC, however,

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<sup>28</sup> *Request for Review of the Decision of the Universal Service Administrator by Prairie City School District*, 15 FCC Rcd 21826 (CCB 1999).

<sup>29</sup> *Id.* at 21827, citing *Request for Review of the Decision of the Universal Service Administrator by Williamsburg-James City Public Schools*, 14 FCC Rcd 20152, 20154-55 (1999) ("Williamsburg could not have been aware of the rules of priority at the time it filed its application." Williamsburg's application was also remanded for reprocessing and issuance of a new funding commitment decision letter. The applicant submitted its application in April of 1998 and new rules were adopted by the Commission in June of 1998.).

<sup>30</sup> *Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District, El Paso, Texas*, 18 FCC Rcd 26406 (2003) ("*Ysleta*"). In *Ysleta* the Commission addressed multiple requests to review the decisions of the SLD that were filed by E-rate applicants, but combined the requests as they had almost identical fact patterns.

<sup>31</sup> *Request for Review of the Decision of the Universal Service Administrator by Winston-Salem/Forsyth County School District, Winston-Salem, North Carolina*, 18 FCC Rcd 26457 (2003) ("*Winston-Salem*").

<sup>32</sup> *Ysleta*, 18 FCC Rcd at 26419-23; *Winston-Salem*, 18 FCC Rcd at 26462.

did not invalidate the applicants' applications based upon this error.<sup>33</sup> It acknowledged that the SLD had previously granted similar funding requests and that Program participants could have reasonably relied on those approvals.<sup>34</sup> The FCC determined that such all-inclusive Form 470s "should not be permitted on a going-forward basis."<sup>35</sup> The FCC therefore "clarif[ied] prospectively that requests for service on the FCC Form 470 that list all services eligible for funding under the E-rate Program do not comply with the statutory mandate."<sup>36</sup> The FCC in *Ysleta* also provided additional guidance regarding other aspects of the E-rate Program rules "to provide greater clarity to those applicants re-bidding services and future applicants."<sup>37</sup>

It is clear that the FCC intended for its precedent in *Ysleta* and *Winston-Salem* to apply to pending or future applications and not applications that have already been granted and funded. Similarly, the FCC should conclude that the SLD cannot retroactively apply the Administrator's new Program rule regarding the timing of valuing traded-in equipment to Spectrum's case.

Riverside's funding requests were approved long before the SLD notified Spectrum of its new

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<sup>33</sup> The Commission did conclude in *Ysleta* that the applicants violated the E-rate Program's rules, although not because of the broad list of services included in the applicants' Form 470s. *Ysleta*, 18 FCC Rcd at 26420-21.

<sup>34</sup> *Ysleta*, 18 FCC Rcd at 26422; see also *Winston-Salem*, 18 FCC Rcd at 26462.

<sup>35</sup> *Ysleta*, 18 FCC Rcd at 26422; see also *Winston-Salem*, 18 FCC Rcd at 26462.

<sup>36</sup> *Ysleta*, 18 FCC Rcd at 26422-23 (citation omitted); see also *Winston-Salem*, 18 FCC Rcd at 26462.

<sup>37</sup> *Ysleta*, 18 FCC Rcd at 26433-34 (emphasis added). The Commission also noted that the "SLD will carefully scrutinize applications" to ensure that they comply with the clarifications elucidated in this case. *Id.* at 26435 (emphasis added). If the Commission wanted the SLD to apply those clarifications retroactively to prior SLD decisions, it would have specifically directed the SLD to do so. The FCC also rejected the argument that it could not apply the E-rate Program rules to the applicants' pending funding requests in an adjudicatory context. According to the FCC, "[t]he fact that in prior years, [the SLD] did not disapprove applications that utilized the procurement processes at issue in no way limits our discretion to apply our existing rules." *Id.* at 26433 (emphasis added).

Program rule. Furthermore, the FCC has never determined that the fair market value of traded-in equipment cannot be established at the time a contract is formed. Spectrum and Riverside (and possibly other E-rate participants) relied on the FCC and SLD rules, and interpretations thereof, which were current in 1999, and reasonably interpreted them to support their valuation of the traded-in equipment at the time of contract formation. The rules in 1999 required a fair market valuation for Riverside's equipment and, as the independent third party appraisal confirms, Spectrum assessed a fair market value for the Riverside equipment.

The FCC also must consider the long term impact on the E-Rate Program if it does not reverse the Administrator's decision in this case. Specifically, it will raise serious questions for other participants in the E-rate Program about whether they can ever rely upon actions taken by the SLD. Allowing the Administrator's decision to stand would mean that the SLD and the Administrator can adopt new policies at will and retroactively deny previously granted applications based upon those new policies after the applications are approved. In the face of such regulatory uncertainty, service providers could certainly conclude that the risk of devoting resources to provide E-rate services is too great. Schools, libraries, students and faculty would be those that ultimately suffer.

**3. The Administrator has Advocated Applying Only Program Rules Relevant to a Particular Funding Year to Its Own Audits.**

The concept of the SLD applying E-rate Program rules that were in effect only for a particular funding year to judge compliance with its program is something USAC, itself, has advocated for its own audits of E-rate Program compliance. In USAC's November 26, 2003 report to the Commission entitled "*Task Force on the Prevention of Waste, Fraud and Abuse*," the Task Force recommends that it develop audit policies that:

reflect compliance with the rules that existed during the funding year to which the funding was associated and to better communicate the degree of

program compliance . . . The Task Force believes that program audits, which are a necessary part of waste, fraud and abuse prevention, need to focus on the policies, procedures, eligible services, etc., that existed during the funding year that is being audited. Measuring program compliance against policies, procedures, eligible services, etc. which were not in place during a particular funding year is inherently unfair and invalid.<sup>38</sup>

This approach should apply equally to participants in the E-rate Program like Riverside and Spectrum. The SLD's new policy regarding when traded-in equipment should be valued, should not be used as the filter through which Spectrum's and Riverside's 1999 agreement is judged. Spectrum and Riverside complied with all Program rules applicable to trade-in equipment that were effective in 1999.

**C. If the FCC Concludes that E-Rate Funds Were Erroneously Disbursed, Should the SLD Seek Reimbursement from Riverside or Spectrum?**

Assuming *arguendo* that the proper valuation date for Riverside's traded-in equipment was July 1, 1999, then Riverside would not have paid its entire non-discounted portion of the E-rate funded services it obtained from Spectrum. Accordingly, if the FCC should conclude that E-rate funds were, in fact, erroneously disbursed in this case as a result of the use of an incorrect

<sup>38</sup> *Recommendations of the Task Force on the Prevention of Waste, Fraud and Abuse*, CC Docket No. 02-6 at 10 (Nov. 26, 2003). The Task Force also makes a number of other recommendations to improve the schools and libraries program, concluding that "the program's competitive bidding process is not working as effectively as policy makers had intended." *Id.* at 5. "The Task Force believes there needs to be greater clarification of program rules, along with increased strong program support staff and educational outreach to further ensure optimal usage of program resources." *Id.* "Prior to the start of the annual training cycle, the SLD needs to provide clear policy, procedures, eligible services list, etc. for the upcoming program year and work to minimize the need for clarifications of the rules during the Program Integrity Assurance review process." *Id.* at 6. "The Task Force believes that if applicants have a better understanding of the rules and standards that will be applied, they will be better equipped to obey them. Providing clarity at the beginning of the cycle will also help avoid the waste associated with pursuing appeals that result from a misunderstanding of the rules." *Id.*



valuation date, the FCC should conclude that Riverside is responsible for any unpaid monies that are the result of it not paying the non-discounted portion of the E-rate services it purchased.<sup>39</sup>

The *Administrator's Decision on Appeal* notes that the FCC requires all erroneous disbursements to be collected from service providers.<sup>40</sup> However, the Commission instructs USAC to recover such funds from "whichever party or parties has committed the statutory rule or violation."<sup>41</sup> The duty to pay the undiscounted portion is solely Riverside's responsibility.<sup>42</sup> In fact, USAC rules expressly prohibit the service provider from taking any action that would eliminate or lessen the applicant's obligation to pay the entire undiscounted portion. Consequently, any failure to pay the undiscounted portion would constitute a Program violation by Riverside, the beneficiary of the E-rate services.

**D. If the FCC Concludes that E-Rate Funds Were Erroneously Disbursed, Do the Facts in this Case Warrant a Waiver of the SLD's New Policy?**

Spectrum and Riverside complied with all applicable FCC and Program rules when they valued Riverside's trade-in equipment at the time they contracted for services through the E-rate Program (i.e., they did not trade-in equipment that was previously funded through the E-rate Program, and the equipment was traded-in at its fair market value). If, however, the Commission determines that the SLD and USAC correctly determined that the valuation timing utilized by

<sup>39</sup> Upon receiving the Recovery Letter, Spectrum promptly discussed it with Riverside and informed it that Spectrum would: (i) appeal it to USAC and, if necessary, the FCC; and (ii) invoice Riverside for the shortfall in matching funds in the event Spectrum's appeals are denied. In the event the Commission agrees with USAC's determination that funds were erroneously disbursed, RCOE should immediately be given an opportunity to pay the invoice from Spectrum.

<sup>40</sup> See *Administrator's Decision on Appeal* at 2 (citing *Changes to the Board of Directors of the National Exchange Carrier Association*, FCC 99-291 ¶ 9 (1999)).

<sup>41</sup> *Federal-State Joint Board on Universal Service*, Order on Reconsideration and Fourth Report and Order, FCC 04-181, CC Docket Nos. 96-45, 97-21, 02-6 at ¶ 1 (rel. July 30, 2004).

<sup>42</sup> *Id.* ¶¶ 13, 15.

Spectrum and Riverside was incorrect based upon a new Program rule and, as a result of this retroactive analysis, Riverside may not have paid the entire non-discounted portion of the services it purchased from Spectrum, then Spectrum requests that the Commission grant a waiver in this case on Riverside's behalf. Riverside should not be forced to pay additional cash consideration for 1999-2000 E-rate services at this time. Had Riverside known that additional cash consideration would be required, it likely would not have contracted for all of the E-rate services it received from Spectrum in the 1999-2000 Program year. As further discussed below, the harm resulting from rescinding the monies allocated to Riverside, or requiring additional cash consideration, far outweighs any purported benefit in denying the waiver, and grant of the waiver is in the public interest.

Pursuant to Section 1.3 of its rules, the FCC may waive one of its rules or procedures when good cause is shown.<sup>43</sup> The U.S. Court of Appeals for the District of Columbia has found that a waiver is appropriate "if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest."<sup>44</sup> Furthermore, there must be a rational policy supporting the grant a waiver.<sup>45</sup> In reviewing a waiver request, the Commission also can weigh "considerations of hardship, equity, or more effective implementation of overall policy."<sup>46</sup> Spectrum's waiver request meets this standard and should therefore be granted.

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<sup>43</sup> 47 C.F.R. § 1.3.

<sup>44</sup> *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 n.3 (D.C. Cir. 1990) ("Northeast Cellular"); see also *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 n.8 (D.C. Cir. 1969) ("WAIT Radio").

<sup>45</sup> *Northeast Cellular*, 897 F.2d at 1166; *WAIT Radio*, 418 F.2d at 1159.

<sup>46</sup> *WAIT Radio*, 418 F.2d at 1159 n.8.

Grant of a waiver in this case will serve the public interest. As previously discussed, there is no way Riverside or Spectrum could have known in 1999 that determining the fair market value for the trade-in equipment at the time of contract formation could be later considered unlawful. The critical public interest policies served by the FCC's and the SLD's rules are to ensure that schools and libraries seeking support through the E-rate Program obtain the most cost-effective services available, thereby lessening applicants' demands on universal service funds and increasing funds available to other applicants.<sup>47</sup> Through Riverside's competitive bidding process, there was fair and open competitive bidding for services, and at the end of the bidding process, Spectrum was found to be most cost-effective choice. As demonstrated above, Riverside did not receive any "free" services from Spectrum, and paid the non-discounted portion of such services with a combination of cash and by trading-in valuable equipment.

The failure to grant a waiver will result in irreparable harm to Riverside. The SLD's Recovery Letter was issued years after the SLD reviewed and approved Riverside's application and Riverside paid monies and traded-in equipment for E-rate services for the 1999-2000 funding year. Services were provided by Spectrum and paid for by Riverside years ago in accordance with all applicable Program rules. Accordingly, if a waiver is not granted, Riverside, who in all likelihood does not have funding in its budget to pay for services rendered years ago, will have to reimburse the monies to SLD. The students and faculty of Riverside will thus be irreparably harmed, which is in direct conflict with the purposes of the E-rate Program.<sup>48</sup>

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<sup>47</sup> *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 9029 (1997).

<sup>48</sup> Although the Commission has considered and rejected waiver requests in prior appeals of SLD funding decisions, the facts of this case are clearly distinguishable from those prior decisions. For example, in *MasterMind*, the SLD denied requests for funding that it had yet to allocate to applicants. See, e.g., *Request for Review of Decisions of the Universal Service Administrator by*

The Commission has previously granted waiver requests "in light of the uncertain application of our rules to the novel situation presented."<sup>49</sup> For example, in *Ysleta* the Commission directed the SLD to allow certain applicants to reapply for E-rate discounts, even though the Commission concluded that the applicants violated the E-rate Program's competitive bidding process by using a certain template approach.<sup>50</sup> According to the Commission, a waiver was appropriate in *Ysleta* because the applicants were likely confused by the application of a new rule to the novel facts presented in that case.<sup>51</sup> The Commission should similarly conclude that a waiver is appropriate here because the SLD is applying a new Program rule in this case to rewrite an agreement that was entered into in 1999 in compliance with all known FCC and USAC rules.

#### IV. RELIEF SOUGHT AND CONCLUSION.

Spectrum requests that the FCC reverse the Administrator's decision denying Spectrum's Appeal and direct the SLD to withdraw the Recovery Letter it issued to Spectrum. If, however, the FCC does not overturn the Administrator's decision, the SLD should seek to recover any funds owed from Riverside. Because the harm in rescinding Riverside's funding would

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*MasterMind Internet Services, Inc.*, 16 FCC Rcd 4028, 4035 (2000). The end result in that case was only that the applicant had to wait another year to apply for and receive funding for services supported by the E-rate Program. In contrast, in the case of Riverside and Spectrum, the SLD has already reviewed, granted and allocated funds pursuant to Riverside's Form 470 and Spectrum has already provided services under that grant. To now reverse the SLD's prior approvals and reclaim amounts already paid would be patently unfair and irreparably harm Spectrum and Riverside.

<sup>49</sup> *Ysleta*, 18 FCC Rcd at 26437.

<sup>50</sup> *Id.* at 26436.

<sup>51</sup> *Id.* at 26437.

outweigh any benefits, Spectrum also requests a waiver of the E-rate Program's rules on Riverside's behalf.

Respectfully submitted,

/s/ Pierre Pendergrass

Pierre Pendergrass  
General Counsel  
Spectrum Communications Cable  
Services, Inc.  
226 North Lincoln Avenue  
Corona, CA 92882  
(909) 273-3114

August 30, 2004

**CERTIFICATE OF SERVICE**

I, Pierre Pendergrass, certify on this 17th day of August, 2004, a copy of the foregoing Request for Review has been served via first class mail, postage pre-paid, to the following:

Universal Service Administrative Company  
Letter of Appeal  
Post Office Box 125 – Correspondence Unit  
80 S. Jefferson Road  
Whippany, NJ 07981

Mr. Elliott Duchon  
R O P Riverside County  
3939 Thirteenth Street  
Riverside, CA 92502

Rina M. Gonzales  
Best Best & Krieger LLP  
3750 University Avenue  
Post Office Box 1028  
Riverside, CA 92502-1028

/s/ Pierre Pendergrass

**Denise Berger**

DOCKET FILE COPY ORIGINAL

**From:** Rina M. Gonzales [Rina.Gonzales@bbklaw.com]

**Sent:** Wednesday, April 27, 2005 2:26 PM

**To:** CCBSecretary

**Subject:** Application for Review filing re File No. SLD-148309, CC Docket No. 02-6 (Email 3 of 4)

<<Scanjob\_20050426\_180301.PDF>>

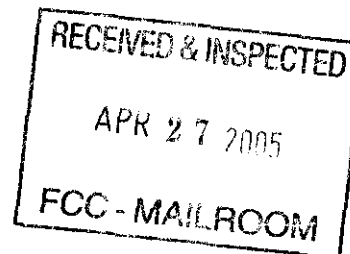
To Whom It May Concern:

Please find attached Riverside County Office of Education's Application for Review regarding File No. SLD-148309, CC Docket No. 02-6 (Email 3 of 4).

If you have any questions, please contact me directly at (951) 961-0335.

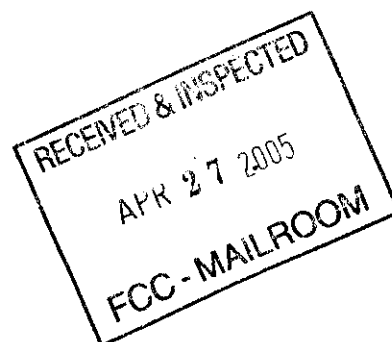
Rina M. Gonzales, Esq.  
Best Best & Krieger LLP

\*\*\*\*\*  
This email and any files transmitted with it may contain privileged or otherwise confidential information. If you are not the intended recipient, or believe that you may have received this communication in error, please advise the sender via reply email and delete the email you received.  
\*\*\*\*\*



4/28/2005

# RCOE EXHIBIT B







**Universal Service Administrative Company**  
Schools & Libraries Division

**Administrator's Decision on Appeal - Funding Year 1999-2000**

July 1, 2004

Pierre F. Pendergrass  
Spectrum Communications Cabling Services, Inc.  
226 North Lincoln Avenue  
Corona, CA 92882

Re: R O P Riverside County

Re: Billed Entity Number: 143743  
471 Application Number: 148309  
Funding Request Number(s): 299355, 299356, 299359, 299361, 299363,  
299365, 299367, 299368, 299370, 299371,  
299372, 299373, 299376, 299377, 299378,  
299379, 299381, 299382

RECEIVED & INSPECTED

APR 27 2005

FCC - MAILROOM

**RECEIVED**

JUL 06 2004

**BEST BEST & KRIEGER**

Your Correspondence Dated: December 2, 2003

After thorough review and investigation of all relevant facts, the Schools and Libraries Division ("SLD") of the Universal Service Administrative Company ("USAC") has made its decision concerning your appeal of SLD's Funding Year 1999 Recovery of Erroneously Disbursed Funds (REDF) Decision for the application number indicated above. This letter explains the basis of SLD's decision. The date of this letter begins the 60-day period for appealing this decision to the Federal Communications Commission ("FCC"). If your letter of appeal included more than one application number, please note that for each application an appeal is submitted, a separate letter is sent.

Funding Request Number(s): 299355, 299356, 299359, 299361, 299363,  
299365, 299367, 299368, 299370, 299371,  
299372, 299373, 299376, 299377, 299378,  
299379, 299381, 299382

Decision on Appeal:  
Explanation:

**Denied in Full**

- You have stated on appeal that the SLD determined that the appropriate valuation date for trade-in equipment is the date the service provider took possession of the equipment but no earlier than the beginning of the funding year, in this case July 1, 1999. You also state that the SLD has relied upon an independent appraisal that Spectrum provided in order to determine the value of the equipment on July 1, 1999. You feel that the SLD

determination in this matter is misguided and SLD should cease its attempt to recover funds disbursed. You close by stating that it is inherently unfair to seek recovery from Spectrum for an incorrect determination of the valuation date because no program rule of FCC guidance on this issue existed at the time the transaction occurred. In fact, the SLD neither announced a rule nor sought guidance from the FCC on this issue until the first quarter of 2003, four years after the transaction. You add that although the independent appraisal Spectrum provided did value the equipment in the amounts indicated in the REDF Letter, this appraisal is not more authoritative than Spectrum's opinion because Spectrum had first hand knowledge of the actual pieces of equipment in question. Further, the appraisal is less reliable than Spectrum's opinion at the time it received the equipment because the appraisal is based upon information that is almost four years old.

- Upon thorough review of the appeal letter and relevant documentation, we find that the facts support SLD's decision. An Internal Audit found that Spectrum Communications accepted a trade-in amount for the above funding requests. This is permitted under program rules because the original equipment was not purchased with program funds. After the Audit findings, the applicant argued that the calculation of the Fair Market Value (FMV) of the equipment should not be based on a 3-year straight-line depreciation schedule, and SLD accepted this presumption. However, the trade-in amount was based on the value of the equipment at the time of the contract, which was before the start of the funding year and several months before Spectrum was set to take possession of the equipment. Spectrum provided an independent appraisal indicating the FMV of the equipment as of July 1, 1999. SLD has accepted this appraisal and determined that the recovery amounts should be based on the date that Spectrum took possession of the equipment, but no earlier than the first day of the funding year. Although the agreement was executed in March 1999, you have indicated that the equipment was not transferred until after the start of Funding Year 1999. Therefore, it is appropriate for SLD to value the equipment as of July 1, 1999. In its role as program Administrator, USAC must ensure that there is no waste, fraud and abuse. Consequently, the appeal is denied.
- The FCC has directed USAC "to adjust funding commitments made to schools and libraries where disbursement of funds associated with those commitments would result in violations of a federal statute" and to pursue collection of any disbursements that were made in violation of a federal statute. See *In re Changes to the Board of Directors of the National Exchange Carrier Association*, CC Docket Nos. 97-21, 96-45, FCC 99-291 ¶ 7 (rel. October 8, 1999). The FCC stated that federal law requires the Commission to "seek repayment of erroneously disbursed funds" where the disbursements would violate a federal statute. *Id.* ¶ 7, 1. The FCC stated that repayment would be sought "from service providers rather than schools and libraries because, unlike schools and libraries that receive discounted services, service providers actually receive disbursements of funds from the universal service support mechanism." *Id.* ¶ 9.

If you believe there is a basis for further examination of your application, you may file an appeal with the Federal Communications Commission (FCC). You should refer to CC Docket No. 02-6 on the first page of your appeal to the FCC. Your appeal must be received or postmarked within 60 days of the above date on this letter. Failure to meet this requirement will result in automatic dismissal of

your appeal. If you are submitting your appeal via United States Postal Service, send to: FCC, Office of the Secretary, 445 12<sup>th</sup> Street SW, Washington, DC 20554. Further information and options for filing an appeal directly with the FCC can be found in the "Appeals Procedure" posted in the Reference Area of the SLD web site or by contacting the Client Service Bureau. We strongly recommend that you use the electronic filing options., ,

We thank you for your continued support, patience, and cooperation during the appeal process.

Schools and Libraries Division  
Universal Service Administrative Company

cc: Mr. Elliott Duchon  
R O P Riverside County  
3939 Thirteenth Street  
Riverside, CA 92502

cc: Rina M. Gonzales  
Best Best & Krieger LLP  
3750 University Avenue  
Post Office Box 1028  
Riverside, CA 92502-1028

**RCOE  
EXHIBIT C**



Box 125 - Correspondence Unit  
100 South Jefferson Road  
Whippany, NJ 07981  
Phone: 888-203-8100

R O P - RIVERSIDE COUNTY  
MR. ELLIOTT DUCHON  
3939 THIRTEENTH STREET  
RIVERSIDE, CA 92502

April 18, 2000

Re: Form 471 Application Number: 148309  
Funding Year: 07/01/1999 - 06/30/2000  
Billed Entity Number: 143743

Thank you for your 1999-2000 E-rate application and for any assistance you provided throughout our review. We have completed processing of your Form 471. This letter is to advise you of our decisions.

#### FUNDING COMMITMENT REPORT

From your Form 471, we reviewed row-by-row discount requests in Items 15 and 16. We assigned each row a Funding Request Number (FRN). On the pages following this letter, we have provided a Funding Commitment Report for each FRN in your application.

Attached to this letter you will find a guide that defines each line of the Funding Commitment Report and a complete list of FRNs from your application. The SLD is also sending this information to your service provider(s) so arrangements can be made to begin implementing your E-rate discount(s). We would encourage you to contact your service providers to let them know your plans regarding these services.

#### FOR QUESTIONS

If you have questions regarding our decisions on your E-rate application, please notify us in writing. Your questions should be sent to: Questions, Schools and Libraries Division, Universal Service Administrative Company, Box 125 - Correspondence Unit, 100 South Jefferson Road, Whippany, NJ 07981.

#### FOR APPEALS

If you wish to appeal to the SLD, your appeal must be made in writing and received by us within 30 days of issuance of this letter as indicated by its postmark. In your letter of appeal, please include: correct contact information for the appellant, information on the Funding Commitment Decision you are appealing and the specific Funding Request Number in question, and an original authorized signature. Appeals sent by fax, e-mail or phone call cannot be processed. Please mail your appeal to: Letter of Appeal, Schools and Libraries Division, Box 125 - Correspondence Unit, 100 South Jefferson Road, Whippany, NJ 07981. You may also call our Client Service Bureau at 888-203-8100. While we encourage you to resolve your appeal with the SLD first, you have the option of filing an appeal directly with the Federal Communications Commission (FCC): FCC, Office of the Secretary, 445 12th Street SW, Room TW-A 325, Washington, D.C. 20554.

#### NEXT STEPS

Once you have reviewed this letter and have determined that some or all of your requests have been funded, your next step is to complete and submit the enclosed FCC Form 486. This Form notifies the SLD that you are currently receiving or have begun receiving services approved for discounts and provides certified indication that your technology plan(s) has been approved. As you complete your Form 486,

you should also contact your service provider to verify they have received notice from the SLD of your commitments. After the SLD processes your Form 486, we can begin processing invoices from your service provider(s) so they can be reimbursed for discounted services they have provided you. For further detailed information on next steps, please review all enclosures.

**NOTICE ON RULES AND FUNDS AVAILABILITY**

Applicants' receipt of funding commitments is contingent on their compliance with all statutory, regulatory, and procedural requirements of the universal service mechanisms for schools and libraries. FCC Form 471 Applicants who have received funding commitments continue to be subject to audits and other reviews that SLD or the Commission may undertake periodically to assure that funds have been committed and are being used in accordance with all such requirements. If the SLD subsequently determines that its commitment was erroneously issued due to action or inaction, including but not limited to that by SLD, the Applicant, or service provider, and that the action or inaction was not in accordance with such requirements, SLD may be required to cancel these funding commitments and seek repayment of any funds disbursed not in accordance with such requirements. The SLD, and other appropriate authorities (including but not limited to USAC and the FCC) may pursue enforcement actions and other means of recourse to collect erroneously disbursed funds.

The timing of payment of invoices may also be affected by the availability of funds based on the amount of funds collected from contributing telecommunications companies.

We look forward to continuing our work with you on connecting our schools and libraries together through communications technology.

Sincerely,  
Kate L. Moore  
President, Schools and Libraries Division, USAC

Enclosures

## EXPLANATION OF A FUNDING COMMITMENT REPORT

Attached to this letter will be a report for each approved E-rate funding request from your application. We are providing the following definitions.

**FUNDING REQUEST NUMBER (FRN):** A Funding Request Number is assigned by the SLD to each line completed in Items 15 and 16 of your Form 471 once an application has been processed. This number is used to report to applicants and vendors the status of individual discount requests submitted on a Form 471. Applicants and vendors learned about FRNs when they received their Receipt Acknowledgement Letter and must use these numbers when completing the Form 486 and Invoices. An FRN will never be longer than 10 digits. If a FRN is shorter than 10 digits, applicants are advised to add zeroes to the front of the numbers to reach 10 digits when filing post-commitment forms.

**FUNDING STATUS:** Each FRN will have one of six definitions: "Funded", "Denied", "Partially Funded", "Funds Exhausted", "Unfunded", or "As Yet Unfunded". An FRN that is "Funded" will be approved at the level that SLD determined is appropriate for that item. That will generally be the level requested by you unless the SLD determines during the application review process that some adjustment is appropriate, for example, a different discount percentage for that FRN than the Form 471 featured. A "Denied" FRN is one for which no funds will be committed, and the reason for that decision will be briefly explained in the "Funding Commitment Decision", and amplification of that explanation may be offered in the section, "Funding Commitment Decision Explanation". In accordance with FCC program rules, FRNs are "Partially Funded" or "Unfunded", if the total amount of funds in the Universal Service Fund is insufficient to fully fund or fund all approved requests. If the Form 471 was received after all the funds in the Universal Service Fund were allocated and it was processed, the status will indicate "Unfunded - Funds Exhausted". "As Yet Unfunded" is a temporary status that would be assigned to an FRN when the SLD is uncertain at the time the letter is generated whether there will be sufficient funds to make commitments for a particular service type at a particular discount level. For example, if your application included both telecommunications services and internal connections, you might receive a letter with our funding commitment for your telecommunications requests and a message that your internal connections requests are "As Yet Unfunded". You would then receive a later letter regarding our funding decision on your internal connections requests.

**SPIN (Service Provider Identification Number):** A unique number assigned by the Universal Service Administrative Company to vendors seeking payment from the Universal Service Fund for participating in the universal service support programs. A SPIN contains 9 digits and should be included by applicants on their completed Form 471 applications. A SPIN is also used to verify delivery of services and to arrange for payment.

**SERVICE PROVIDER NAME:** The legal name of the service provider.

**PROVIDER CONTRACT NUMBER:** The number of the contract between the eligible party and the service provider. This will be present only if a contract number was provided on Form 471.

**SERVICES ORDERED:** The type of service ordered from the service provider, as shown on Form 471.

**EARLIEST POSSIBLE EFFECTIVE DATE OF DISCOUNT:** The first possible date of service for which the SLD will reimburse service providers for the discounts for the service. Note: If the actual service start date provided on a Form 486 is later than this date, the actual service start date set forth in the Form 486 will be the effective date of the discount.

RCOE  
Exhibit C  
Page 3 of 9



**CONTRACT EXPIRATION DATE:** The date the contract expires. This will be present only if a contract expiration date was provided on Form 471. This is not applicable for tariff services.

**SITE IDENTIFIER:** This will appear only for FRNs listed in Item 16 of your Form 471. For public schools, the 12-digit NCES code you listed in Item 14 for this school site will appear here. If there is no NCES Code for an FRN in Item 16, the SLD-assigned entity number will appear here.

**PRE-DISCOUNT COST:** Amount in Column 10 of Item 15/16, Form 471, as determined through the application review process. Please note that, during the Problem Resolution process at SLD, the amount in Col. 10 of Item 15/16 may have been corrected to conform to the information provided about Service Start Date and Monthly Costs.

**DISCOUNT PERCENTAGE APPROVED BY THE SLD:** This is the discount rate that the SLD has approved for this service.

**FUNDING COMMITMENT DECISION:** This represents the total amount of funding that the SLD is now reserving to reimburse service providers for the discounts for this service through June 30, 2000. This figure may be different from the Estimated Total Annual Pre-Discount Cost (Col. 10 of Item 15/16) times the Percentage Discount (Col. 11 of Item 15/16) in the 471 application. It may be lower because of an adjustment determined appropriate by the SLD, such as of the discount percentage, or a denial of discounts and, if so, the accompanying comment will explain this difference. The difference may also reflect a reduction from the request level made necessary by overall funding limitations, in which case the "Funding Status" above will indicate "Partially Funded" or "Unfunded". Whatever amount is listed here, it is important that you and the service provider both recognize that the SLD should be invoiced and the SLD may direct disbursement of discounts on only eligible, approved services actually rendered.

**FUNDING COMMITMENT DECISION EXPLANATION:** This entry may appear to amplify the comment in the "Funding Commitment Decision", if the discount request for this service is denied for reasons other than "Unfunded" or if the SLD determined that some adjustment to the request level was appropriate.

FUNDING COMMITMENT REPORT FOR APPLICATION NUMBER: 0000148309

Funding Request Number: 0000299353      Funding Status: Funded  
SPIN: 143010165      Service Provider Name: Spectrum Communications  
Provider Contract Number: RUSD  
Services Ordered: Internal Connections (Shared)  
Earliest Possible Effective Date of Discount: 07/01/1999  
Contract Expiration Date: 04/30/2001  
Pre-discount Cost: \$367,807.88  
Discount Percentage Approved by the SLD: 67%  
Funding Commitment Decision: \$246,431.28 - 471 approved as submitted

Funding Request Number: 0000299354      Funding Status: Funded  
SPIN: 143010165      Service Provider Name: Spectrum Communications  
Provider Contract Number: NVUSD  
Services Ordered: Internal Connections (Shared)  
Earliest Possible Effective Date of Discount: 07/01/1999  
Contract Expiration Date: 04/30/2001  
Pre-discount Cost: \$49,332.51  
Discount Percentage Approved by the SLD: 67%  
Funding Commitment Decision: \$33,052.78 - 471 approved as submitted

Funding Request Number: 0000299355      Funding Status: Funded  
SPIN: 143010165      Service Provider Name: Spectrum Communications  
Provider Contract Number: PSUSD  
Services Ordered: Internal Connections (Shared)  
Earliest Possible Effective Date of Discount: 07/01/1999  
Contract Expiration Date: 04/30/2001  
Pre-discount Cost: \$258,943.51  
Discount Percentage Approved by the SLD: 67%  
Funding Commitment Decision: \$173,492.15 - 471 approved as submitted

Funding Request Number: 0000299356      Funding Status: Funded  
SPIN: 143010165      Service Provider Name: Spectrum Communications  
Provider Contract Number: CNUSD  
Services Ordered: Internal Connections (Shared)  
Earliest Possible Effective Date of Discount: 07/01/1999  
Contract Expiration Date: 06/30/2001  
Pre-discount Cost: \$501,442.85  
Discount Percentage Approved by the SLD: 67%  
Funding Commitment Decision: \$335,966.71 - 471 approved as submitted

Funding Request Number: 0000299359      Funding Status: Funded  
SPIN: 143010165      Service Provider Name: Spectrum Communications  
Provider Contract Number: SJUSD  
Services Ordered: Internal Connections (Shared)  
Earliest Possible Effective Date of Discount: 07/01/1999  
Contract Expiration Date: 06/30/2001  
Pre-discount Cost: \$113,027.59  
Discount Percentage Approved by the SLD: 67%  
Funding Commitment Decision: \$75,728.49 - 471 approved as submitted

FUNDING COMMITMENT REPORT FOR APPLICATION NUMBER: 0000148309

Funding Request Number: 0000299361      Funding Status: Funded  
SPIN: 143010165      Service Provider Name: Spectrum Communications  
Provider Contract Number: VVSD  
Services Ordered: Internal Connections (Shared)  
Earliest Possible Effective Date of Discount: 07/01/1999  
Contract Expiration Date: 06/30/2001  
Pre-discount Cost: \$466,577.26  
Discount Percentage Approved by the SLD: 67%  
Funding Commitment Decision: \$312,606.76 - 471 approved as submitted

Funding Request Number: 0000299363      Funding Status: Funded  
SPIN: 143010165      Service Provider Name: Spectrum Communications  
Provider Contract Number: PVUSD  
Services Ordered: Internal Connections (Shared)  
Earliest Possible Effective Date of Discount: 07/01/1999  
Contract Expiration Date: 06/30/2001  
Pre-discount Cost: \$129,471.76  
Discount Percentage Approved by the SLD: 67%  
Funding Commitment Decision: \$86,746.08 - 471 approved as submitted

Funding Request Number: 0000299365      Funding Status: Funded  
SPIN: 143010165      Service Provider Name: Spectrum Communications  
Provider Contract Number: HUSD  
Services Ordered: Internal Connections (Shared)  
Earliest Possible Effective Date of Discount: 07/01/1999  
Contract Expiration Date: 06/30/2001  
Pre-discount Cost: \$316,498.11  
Discount Percentage Approved by the SLD: 67%  
Funding Commitment Decision: \$212,053.73 - 471 approved as submitted

Funding Request Number: 0000299367      Funding Status: Funded  
SPIN: 143010165      Service Provider Name: Spectrum Communications  
Provider Contract Number: MUSD  
Services Ordered: Internal Connections (Shared)  
Earliest Possible Effective Date of Discount: 07/01/1999  
Contract Expiration Date: 06/30/2001  
Pre-discount Cost: \$65,776.68  
Discount Percentage Approved by the SLD: 67%  
Funding Commitment Decision: \$44,070.38 - 471 approved as submitted

Funding Request Number: 0000299368      Funding Status: Funded  
SPIN: 143010165      Service Provider Name: Spectrum Communications  
Provider Contract Number: RSD  
Services Ordered: Internal Connections (Shared)  
Earliest Possible Effective Date of Discount: 07/01/1999  
Contract Expiration Date: 06/30/2001  
Pre-discount Cost: \$57,554.60  
Discount Percentage Approved by the SLD: 67%  
Funding Commitment Decision: \$38,561.58 - 471 approved as submitted

FUNDING COMMITMENT REPORT FOR APPLICATION NUMBER: 0000148309

Funding Request Number: 0000299369      Funding Status: Funded  
SPIN: 143010165      Service Provider Name: Spectrum Communications  
Provider Contract Number: DCUSD  
Services Ordered: Internal Connections (Shared)  
Earliest Possible Effective Date of Discount: 07/01/1999  
Contract Expiration Date: 06/30/2001  
Pre-discount Cost: \$24,666.26  
Discount Percentage Approved by the SLD: 67%  
Funding Commitment Decision: \$16,526.39 - 471 approved as submitted

Funding Request Number: 0000299370      Funding Status: Funded  
SPIN: 143010165      Service Provider Name: Spectrum Communications  
Provider Contract Number: DSUSD  
Services Ordered: Internal Connections (Shared)  
Earliest Possible Effective Date of Discount: 07/01/1999  
Contract Expiration Date: 06/30/2001  
Pre-discount Cost: \$468,554.51  
Discount Percentage Approved by the SLD: 67%  
Funding Commitment Decision: \$313,931.52 - 471 approved as submitted

Funding Request Number: 0000299371      Funding Status: Funded  
SPIN: 143010165      Service Provider Name: Spectrum Communications  
Provider Contract Number: AUSD  
Services Ordered: Internal Connections (Shared)  
Earliest Possible Effective Date of Discount: 07/01/1999  
Contract Expiration Date: 06/30/2001  
Pre-discount Cost: \$283,609.77  
Discount Percentage Approved by the SLD: 67%  
Funding Commitment Decision: \$190,018.55 - 471 approved as submitted

Funding Request Number: 0000299372      Funding Status: Funded  
SPIN: 143010165      Service Provider Name: Spectrum Communications  
Provider Contract Number: JUSD  
Services Ordered: Internal Connections (Shared)  
Earliest Possible Effective Date of Discount: 07/01/1999  
Contract Expiration Date: 06/30/2001  
Pre-discount Cost: \$324,720.19  
Discount Percentage Approved by the SLD: 67%  
Funding Commitment Decision: \$217,562.53 - 471 approved as submitted

Funding Request Number: 0000299373      Funding Status: Funded  
SPIN: 143010165      Service Provider Name: Spectrum Communications  
Provider Contract Number: LEUSD  
Services Ordered: Internal Connections (Shared)  
Earliest Possible Effective Date of Discount: 07/01/1999  
Contract Expiration Date: 06/30/2001  
Pre-discount Cost: \$275,387.68  
Discount Percentage Approved by the SLD: 67%  
Funding Commitment Decision: \$184,509.75 - 471 approved as submitted

FUNDING COMMITMENT REPORT FOR APPLICATION NUMBER: 0000148309

Funding Request Number: 0000299374      Funding Status: Funded  
SPIN: 143010165      Service Provider Name: Spectrum Communications  
Provider Contract Number: CUSD  
Services Ordered: Internal Connections (Shared)  
Earliest Possible Effective Date of Discount: 07/01/1999  
Contract Expiration Date: 06/30/2001  
Pre-discount Cost: \$261,024.12  
Discount Percentage Approved by the SLD: 67%  
Funding Commitment Decision: \$174,886.16 - 471 approved as submitted

Funding Request Number: 0000299375      Funding Status: Funded  
SPIN: 143010165      Service Provider Name: Spectrum Communications  
Provider Contract Number: BUSD  
Services Ordered: Internal Connections (Shared)  
Earliest Possible Effective Date of Discount: 07/01/1999  
Contract Expiration Date: 06/30/2001  
Pre-discount Cost: \$137,693.84  
Discount Percentage Approved by the SLD: 67%  
Funding Commitment Decision: \$92,254.87 - 471 approved as submitted

Funding Request Number: 0000299376      Funding Status: Funded  
SPIN: 143010165      Service Provider Name: Spectrum Communications  
Provider Contract Number: BANUSD  
Services Ordered: Internal Connections (Shared)  
Earliest Possible Effective Date of Discount: 07/01/1999  
Contract Expiration Date: 06/30/2001  
Pre-discount Cost: \$154,138.01  
Discount Percentage Approved by the SLD: 67%  
Funding Commitment Decision: \$103,272.47 - 471 approved as submitted

Funding Request Number: 0000299377      Funding Status: Funded  
SPIN: 143010165      Service Provider Name: Spectrum Communications  
Provider Contract Number: PJUSD  
Services Ordered: Internal Connections (Shared)  
Earliest Possible Effective Date of Discount: 07/01/1999  
Contract Expiration Date: 06/30/2001  
Pre-discount Cost: \$129,471.76  
Discount Percentage Approved by the SLD: 67%  
Funding Commitment Decision: \$86,746.08 - 471 approved as submitted

Funding Request Number: 0000299378      Funding Status: Funded  
SPIN: 143010165      Service Provider Name: Spectrum Communications  
Provider Contract Number: PELEM  
Services Ordered: Internal Connections (Shared)  
Earliest Possible Effective Date of Discount: 07/01/1999  
Contract Expiration Date: 06/30/2001  
Pre-discount Cost: \$65,776.68  
Discount Percentage Approved by the SLD: 67%  
Funding Commitment Decision: \$44,070.38 - 471 approved as submitted

FUNDING COMMITMENT REPORT FOR APPLICATION NUMBER: 0000148309

Funding Request Number: 0000299379      Funding Status: Funded  
SPIN: 143010165      Service Provider Name: Spectrum Communications  
Provider Contract Number: TUSD  
Services Ordered: Internal Connections (Shared)  
Earliest Possible Effective Date of Discount: 07/01/1999  
Contract Expiration Date: 06/30/2001  
Pre-discount Cost: \$267,165.60  
Discount Percentage Approved by the SLD: 67%  
Funding Commitment Decision: \$179,000.95 - 471 approved as submitted

Funding Request Number: 0000299381      Funding Status: Funded  
SPIN: 143010165      Service Provider Name: Spectrum Communications  
Provider Contract Number: MUSD  
Services Ordered: Internal Connections (Shared)  
Earliest Possible Effective Date of Discount: 07/01/1999  
Contract Expiration Date: 06/30/2001  
Pre-discount Cost: \$187,026.35  
Discount Percentage Approved by the SLD: 67%  
Funding Commitment Decision: \$125,307.65 - 471 approved as submitted

Funding Request Number: 0000299382      Funding Status: Funded  
SPIN: 143010165      Service Provider Name: Spectrum Communications  
Provider Contract Number: JUSD  
Services Ordered: Internal Connections (Shared)  
Earliest Possible Effective Date of Discount: 07/01/1999  
Contract Expiration Date: 06/30/2001  
Pre-discount Cost: \$589,804.18  
Discount Percentage Approved by the SLD: 67%  
Funding Commitment Decision: \$395,168.80 - 471 approved as submitted

**RCOE**  
**EXHIBIT D**

## BEST BEST & KRIEGER LLP

A CALIFORNIA LIMITED LIABILITY PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

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ORANGE COUNTY  
(949) 260-0962  
SACRAMENTO  
(916) 325-4000

December 2, 2003

Letter of Appeal  
Schools and Libraries Division  
Box 125 - Correspondence Unit  
80 South Jefferson Road  
Whippany, NJ 07981

Re: Billed Entity Name: Riverside County Office of Education  
Billed Entity Number: 143743  
E-Rate Funding Year 1999-2000; FCC Form 471 Application Number: 148309  
Schools and Libraries Division letter dated: October 3, 2003

Dear School and Libraries Division:

The law firm of Best, Best & Krieger LLP represents the Riverside County Office of Education ("RCOE") in this matter and is filing this letter of appeal on its behalf. This appeal concerns the letter sent to RCOE on October 3, 2003, from the Universal Service Administrative Company ("USAC"), Schools and Libraries Division ("SLD").<sup>1</sup> The SLD letter states that SLD determined that funds were disbursed in error. The letter asserts that RCOE did not pay a portion of the discounted charges for which it was responsible, and demands reimbursement of a portion of the moneys paid to Spectrum Communications Cabling Services, Inc. ("Spectrum"), the service provider for the contracts in question. SLD's decision is based on its position that trade-in equipment was over-valued, in part because SLD utilizes a later trade-in date than that used by Spectrum when it valued the equipment. The SLD decision demands the repayment of \$707,521.34 which was allegedly erroneously disbursed for the benefit of 16 individual school districts. A true and correct copy of the letter decision from which RCOE appeals is attached hereto as Exhibit "A." RCOE appeals on the ground that any moneys found due and owing to USAC, SLD should be recovered from Spectrum, not RCOE.

RCOE is filing this appeal because SLD sent a copy of its decision letter to RCOE, and that letter did not identify the party from which SLD was proposing to recover the allegedly wrongfully disbursed funds. The letter does not demand reimbursement from RCOE or offer any authority

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<sup>1</sup> RCOE is informed and believes that this same letter and request from the SLD was also sent to Spectrum Communications Cabling Services, Inc. because Spectrum was the Service Provider for RCOE and received direct payment from the USAC, SLD for the funding year at issue.



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Page 2

supporting an attempt to recover any portion of the allegedly erroneously disbursed funds from RCOE. RCOE requests that the SLD confirm that it is not seeking any reimbursement from RCOE.

The person who can most readily discuss this appeal with the SLD is:

John E. Brown  
Attorney for Riverside County Office of Education  
Best Best & Krieger LLP  
3750 University Avenue, Suite 400  
Riverside, CA 92507  
Phone: (909) 686-1450  
Facsimile: (909) 686-3083  
E-mail: [JEBrown@bbklaw.com](mailto:JEBrown@bbklaw.com)

### **Factual Background**

RCOE is a service agency which provides support for 23 school districts within Riverside County. As such, RCOE may serve as an agent for the school districts in acquiring federal and state funding.

In late 1999, RCOE filed a Federal Communications Commission ("FCC") Form 470 application with USAC as a consortium, on behalf of its school districts, for E-rate Year 2 funding. The fiscal year for which RCOE sought funding by that application was 1999-2000. After RCOE's FCC Form 470 application was approved, it was posted on the Internet as required by 47 C.F.R. section 54.504.

RCOE selected Spectrum from the interested vendors to be the service provider for the county school districts. The decision to select Spectrum was based, in part, on the fact that Spectrum had worked with many of the school districts as part of the county's "Riverlink Project."<sup>2</sup> Based on its work in 1998 on the Riverlink Project, in which Spectrum supplied equipment to school districts, Spectrum knew of the existing equipment and technology needs of many of the school districts. The decision to select Spectrum also was based, in part, on the fact that Spectrum had experience as an E-rate service provider. Based on that experience, Spectrum counseled RCOE and the school districts that the districts could trade-in, and Spectrum would accept, existing equipment<sup>3</sup> for the new equipment.

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<sup>2</sup> The RCOE Superintendent's goal of the Riverlink Project was to get a majority of Riverside County school classrooms connected to the Internet.

<sup>3</sup> Any equipment traded-in was not purchased with Universal Service Funds (i.e., non-E-rate funded equipment.).

## Letter of Appeal

Schools and Libraries Division

December 2, 2003

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In or around January 2000, RCOE took the next step toward securing E-rate Year 2 funding and submitted a consortium application – FCC Form 471 – for fiscal year 1999-2000 to the USAC, SLD on behalf of 23 school districts. This application included the estimated costs for each district's technology installation. The estimated costs in the FCC Form 471 were derived from meetings between RCOE, Spectrum and the school district Technology Directors or district employee(s) with responsibility for technology. At the meetings, each district explained its present technology status to Spectrum so that Spectrum could estimate the district's equipment needs.

On or about April 18, 2000, RCOE received a Funding Commitment Decision Letter from USAC which indicated that RCOE's FCC Form 471 application was approved as submitted. The Funding Commitment Decision Letter indicated that each district would be responsible for paying 33% of the technology installation, while the other 67% would be paid directly to the identified service provider – Spectrum – by USAC.

Sixteen of RCOE's school districts took advantage of Spectrum's offer to credit trade-in equipment value to meet some or all of their 33% match obligation. Those 16 school districts are now the subject of SLD's request for recovery of allegedly erroneously disbursed funds. The 16 school districts are as follows: (1) Alvord Unified School District; (2) Banning Unified School District; (3) Corona/Norco Unified School District; (4) Desert Sands Unified School District; (5) Hemet Unified School District; (6) Jurupa Unified School District; (7) Lake Elsinore Unified School District; (8) Menifee Unified School District; (9) Moreno Valley Unified School District; (10) Murrieta Valley Unified School District; (11) Palm Springs Unified School District; (12) Palo Verde Unified School District; (13) Perris School District; (14) Romoland School District; (15) Temecula Valley Unified School District; and (16) Val Verde Unified School District.<sup>4</sup> All other districts that participated in Year 2 did not trade-in equipment, but instead made a cash payment for their 33% match amount to Spectrum.

Although the application was filed by RCOE, each school district was individually responsible for management of the funding and program implementation with the district schools. Each school district dealt directly with Spectrum to identify its technology needs and to identify equipment to be traded in. Each school district separately negotiated the trade-in value, based in large part on Spectrum's expertise and knowledge in the technology industry and proposed trade-in valuations. Each school district separately issued purchase orders to Spectrum, using California's Multiple Award Schedule ("CMAS") contracting procedure, to obtain the services and equipment ultimately ordered. Given the very short time frame available to proceed with the project for the school districts, RCOE and the school districts had to rely on Spectrum's experience implementing the district's technology goals, awareness of the districts' existing technology, knowledge of the fair market value of that

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<sup>4</sup> RCOE was informed that Corona/Norco Unified School District and Jurupa Unified School District would both trade in old equipment and make a cash payment to meet their 33% match amounts.

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Page 4

technology, and evaluation of district needs regarding upgrades. RCOE relied on the values that were provided by Spectrum and agreed to by the school districts with respect to both the trade-in value and the scope and cost of each district's technology installation.

In or around October 2001, USAC engaged Arthur Andersen to conduct an audit of the RCOE application. The audit was undertaken with the assistance of RCOE, the school districts and Spectrum. As a result of the audit, Arthur Andersen questioned the trade-in value placed on the used equipment. Spectrum then commissioned an independent appraisal of the trade-in equipment. Based on the Arthur Andersen audit and using July 1, 1999 appraisal values from the Spectrum appraisal report, on or about October 3, 2003 USAC sent both RCOE and Spectrum a letter requesting "Recovery of Erroneously Disbursed Funds" to both parties for the amount of \$707,521.34.

The October 3, 2003 letter from the SLD alleges that the Universal Service Funding provided to the 16 districts listed above was "erroneously disbursed" and provides the following explanation to each district:

"Disbursed Funds Recovery Explanation: After a detailed review of documentation pertaining to this funding request the SLD has found that a recovery of erroneously disbursed funds in the amount of [dollar amount differs for each district] is required. A beneficiary audit discovered that the service provider accepted trade-in for the non-discounted share of services provided. This is permitted under the rules of the Schools and Libraries Division Support Mechanism, as the original equipment was not purchased with Universal Service Funds. The valuation of the trade-in equipment must be based on the fair market value of the equipment. Furthermore, the valuation date should be the date that service provider took possession of the equipment, but not earlier than the beginning of the funding year. The service provider has provided an independent appraisal of the trade-in equipment. Using the July 1, 1999 value indicated in that appraisal, it was determined that the trade-in value was only [dollar amount differs for each district], which is [dollar amount differs for each district] less than the non-discounted share of [dollar amount differs for each district] that the applicant was obligated to pay. Since the applicant did not cover [dollar amount differs for each district] of their portion of the charges, the corresponding portion of these charges paid by SLD must be recovered. At the 67 percent rate of this request, that translates to [dollar amount differs for each district]. As a result this amount of [dollar amount differs for each district] determined to have been erroneously disbursed and must now be recovered."

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RCOE is informed and believes that Spectrum intends to appeal the SLD's decision on the ground that all trade-in equipment should be valued on or around March 1, 1999. As discussed below, RCOE has no obligation to refund any of the funds received by Spectrum in connection with the E-rate Year 2 funding at issue. However, to the extent that USAC seeks to recover any moneys from RCOE, any amount sought should be adjusted based on the extent that Spectrum is successful in establishing a higher trade-in value than that reflected in the SLD decision.

### Grounds for Appeal

1. Spectrum Is Responsible for the Repayment of Any Funds Found to Be Erroneously Disbursed

In FCC Order No. 99-291,<sup>5</sup> the FCC directed USAC to adjust funding commitments made to schools and libraries where disbursement of funds associated with those commitments would result in violations of a federal statute. The FCC stated that it would seek payment from service providers rather than schools and libraries because, unlike schools and libraries that receive discounted services, service providers actually receive disbursements of funds from the universal service support mechanism. (FCC Order No. 99-291, ¶ 8.)

In the instant action, although the SLD has not claimed that the allegedly erroneous disbursement of funds is a violation of a federal statute, the principles articulated in FCC Order No. 99-291 should apply. As an experienced technology service provider, Spectrum assisted the districts in determining what technology was required, provided pricing for that technology as a CMAS vendor, and provided what it represented to be the fair market value of all trade-in equipment.<sup>6</sup> The districts relied on Spectrum's superior knowledge and representations as to the value of the trade-in equipment when they made their ultimate decisions as to what new equipment to purchase and when they determined the additional funding, if any, that was necessary to secure that equipment. Similarly, RCOE relied on the information provided by Spectrum in preparing the application on behalf of the school districts and representing that the school districts had secured access to all resources necessary to pay the discounted charges for eligible services.

To the extent that SLD establishes that the trade-in values were overstated, Spectrum was the party with superior knowledge as to the appropriate fair market value for the equipment. Further, based on Spectrum's assertion of experience and expertise as an E-rate funding service provider, RCOE and the districts relied on Spectrum to have knowledge of the appropriate trade-in valuation

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<sup>5</sup> A true and correct copy of FCC Order No. 99-291 is attached hereto as Exhibit "B."

<sup>6</sup> As between Spectrum and the school districts, RCOE asserts that Spectrum is contractually bound by the trade in value the parties agreed upon and may not recover additional funds from the districts.

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date for purposes of E-rate exchanges. Finally, Spectrum was the party that received the allegedly excess amounts. It is necessary and appropriate that, if funds are to be recovered by USAC, SLD, the party making the overstatement of trade-in value and receiving the allegedly excess funds should be obligated to repay those funds. Thus, the rationale stated in FCC Order No. 99-291 should apply and USAC should recover any funds found due and owing from Spectrum.

2. Perris Unified School District and San Jacinto Unified School District Did Not Participate in E-rate Year 2

Perris Union High School District ("Perris Union HSD") and San Jacinto Unified School District ("San Jacinto USD") were both included in the RCOE FCC Form 471 consortium application<sup>7</sup>, however these two districts chose not to participate after the RCOE application had been filed and approved.<sup>8</sup> RCOE is informed that Perris Union HSD and San Jacinto USD did not receive any new equipment, and did not trade-in any equipment to Spectrum. However, it appears that Spectrum submitted invoices to SLD on behalf of these districts because both districts are included in the SLD request for recovery of erroneously disbursed funds. To the extent that Spectrum cannot document that it actually provided the equipment to Perris Union HSD or San Jacinto USD, SLD should direct any request for recovery concerning these two districts to Spectrum.

3. Palm Springs Unified School District Did Not Utilize All of the Funding it Requested

Palm Springs Unified School District ("Palm Springs USD") also was included in the RCOE FCC Form 471 consortium application<sup>9</sup>, but it did not utilize all of the funding it requested in the application. RCOE is informed that Spectrum submitted invoices to SLD on behalf of Palm Spring USD for the full amount requested. To the extent that Spectrum cannot document that it actually provided the full amount of equipment to Palm Springs USD, RCOE concurs that SLD should direct any request for recovery of the excess claimed concerning that district to Spectrum.

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<sup>7</sup> For identification purposes, Perris Union HSD's Funding Request Number is 299377 (approved and funded for \$86,746) and San Jacinto USD's Funding Request Number is 299359 (approved and funded for \$75,728).

<sup>8</sup> RCOE provided this information to Arthur Anderson when it audited the RCOE consortium application.

<sup>9</sup> For identification purposes, Palm Spring USD's Funding Request Number is 299355 (approved and funded for \$173,492.15.)

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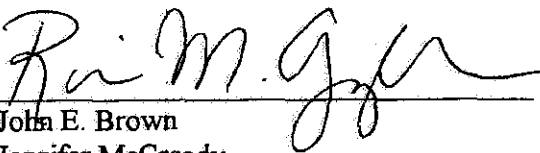
**Conclusion**

Based on the foregoing, RCOE respectfully requests that the SLD reconsider or clarify its decision and expressly confirm that it is not seeking recovery of some or all of the allegedly erroneously disbursed funds from RCOE or the school districts.

If your office has any questions regarding this matter, please do not hesitate to contact our office at (909) 686-1450 or via e-mail at <JEBrown@bbklaw.com>. Thank you for your consideration in this matter.

DATED: December 2, 2003

By:



John E. Brown

Jennifer McCready

Rina M. Gonzales

Attorneys for Riverside County Office of Education

# RCOE EXHIBIT E



**SPECTRUM COMMUNICATIONS**  
**CABLING SERVICES, INC.**

December 2, 2003

**LETTER OF APPEAL**

*(Sent via email, facsimile and Federal Express)*

**Letter of Appeal**  
**Schools and Libraries Division**  
**Box 125 - Correspondence Union**  
**80 South Jefferson Road**  
**Whippany, NJ 07981**

**Re: Recovery of Erroneously Disbursed Funds**  
**Funding Year 1999-2000**  
**Form 471 Application Number: 148309**  
**Applicant Name R O P - Riverside County**

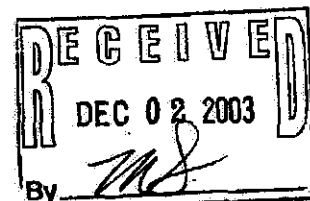
**Dear Schools and Libraries Division:**

Spectrum Communications ("Spectrum") submits this letter to appeal the SLD's Recovery Of Erroneously Disbursed Funds for the following Funding Request Numbers (the "FRNs" or, individually, "FRN"): 299376, 299377, 299378, 299379, 299381, 299382, 299355, 299356, 299359, 299361, 299363, 299365, 299367, 299368, 299370, 299371, 299372 and 299373.

The Disbursed Funds Recovery Letter is dated October 3, 2003. The named applicant is R O P Riverside County. The Form 471 Application Number is 148309. The Billed Entity Number is 143743.

Provided below is the contact information for the person authorized to discuss this appeal on behalf of Spectrum:

**Pierre F. Pendergrass**  
**General Counsel**  
**Spectrum Communications**  
**226 N. Lincoln Avenue**  
**Corona, CA 92882**  
**Tel.: 909-371-0549**  
**Fax: 909-273-3114**  
**Email: [Pierre@Spectrumccsi.com](mailto:Pierre@Spectrumccsi.com)**



**226 NORTH LINCOLN AVENUE • CORONA, CA 92882**  
**(909) 371-0549 • (800) 319-8711 • FAX (909) 273-3114**  
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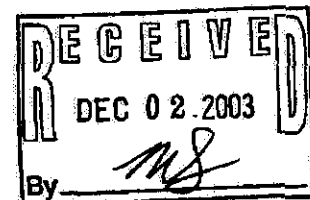


## I. PRELIMINARY STATEMENT

Spectrum, a privately held corporation founded in 1985, is a provider of information technology products and services. The company's customer base is primarily the education market, public sector agencies and large healthcare facilities. The company has participated in the E-Rate program since 1998. Since then, Spectrum has acted as a service provider for approximately 38 different school districts.

R O P - Riverside County, also known as the Riverside County Office of Education ("RCOE"), is a service agency supporting Riverside County's 23 school districts and linking them with the California Department of Education. RCOE provides, among other services, assistance to its member districts in the deployment and maintenance of network and telecommunications services. There are approximately 6.1 million students enrolled throughout Riverside County for the 2002-03 school year.

For E-Rate Funding Year 1999-2000, RCOE formed a consortium of its member school districts for the purpose of applying for E-Rate discounts. On March 5, 1999, RCOE filed a Form 470 (Number 220100000227898) soliciting proposals from prospective service providers for a range of E-Rate eligible products and services. After examining existing equipment which RCOE consortium members intended to trade-in to Spectrum for the purpose of providing its E-Rate matching funds, Spectrum determined the fair market value of the equipment to be \$1,813,505.83. Spectrum then submitted a bid proposal in response to the Form 470 and RCOE subsequently selected Spectrum as the service provider for the consortium. On April 5, 1999, RCOE filed a Form 471 (number 148309) evincing its acceptance of Spectrum's proposal and its selection of Spectrum as its service provider for Funding Year 1999-2000.



The total pre-discount value of the agreement between RCOE and Spectrum was \$5,495,472.20. RCOE was eligible for an E-Rate discount of sixty-seven percent (67%). Consequently, RCOE and/or its consortium members were required to provide matching funds at a rate of 33% or \$1,813,505.83 total. In or around March, 1999, when RCOE and Spectrum entered into the agreement for E-Rate services, the parties agreed that Spectrum would accept, in lieu of cash, the consortium equipment Spectrum had valued at \$1,813,505.83 as RCOE's payment for the non-discounted portion of the contract price.

The SLD now contests the value of the trade-in equipment RCOE provided as its matching component. More precisely, the SLD contends that the appropriate trade-in value of the equipment was its fair market value at the beginning of the funding year (July 1, 1999) and not its fair market value on the date RCOE and Spectrum entered into the agreement for services (March 1999). The SLD contends that the total fair market value of the consortium's equipment on July 1, 1999 was \$1,316,159. Consequently, the SLD seeks recovery in the amount of \$707,521.34.

## II. THE DISBURSED FUNDS RECOVERY LETTER

The Disbursed Funds Recovery Letter, dated October 3, 2003, is a total of 22 pages. Pages 1 through 4 describe the process for filing an appeal and also provide a guide to the funding disbursement synopsis. Pages 5 through 22 each seek recovery for a specific FRN. For each of the 18 FRNs in question, the basis of recovery is the contention that on July 1, 1999, the fair market value of the trade-in equipment was less than the non-discounted share that the applicant was required to pay. Specifically, for each of the FRNs, the *Disbursed Funds Recovery Letter* states the following:

"The valuation of the trade-in equipment must be based on the fair market value of the equipment. Furthermore, the valuation date should be the date

